**IN THE HIGH COURT OF GUJARAT AT AHMEDABAD**

**CRIMINAL MISC.APPLICATION No. 9909 of 2007**

**For Approval and Signature:**

**HONOURABLE MR.JUSTICE M.R. SHAH**

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the Civil Judge?

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**B.K. SARKAR & 1 - Applicant(s)**
**Versus**
**STATE OF GUJARAT & 1 - Respondent(s)**

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**Appearance :**
MR DIPEN K DAVE for Applicant(s) : 1 - 2.
MR KT DAVE, ADDL. PUBLIC PROSECUTOR for Respondent(s) : 1,
MR YJ PATEL for Respondent(s) : 2,
MR PP MAJMUDAR for Respondent(s) : 2,

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**CORAM : HONOURABLE MR.JUSTICE M.R. SHAH**

**Date : 12/09/2007**

**ORAL JUDGMENT**

***Rule***. Mr.P.P.Majmudar, learned Advocate waives service of rule on behalf of respondent No.2.

Mr.K.T.Dave, learned APP waives service of rule on behalf of respondent No.1.

2. By way of this application under Section 482 of the Criminal Procedure Code, the petitioners – original accused have prayed for an appropriate order to quash and set aside the Criminal Case being No. 506/2005 pending in the Court of learned Chief Judicial Magistrate, Surendranagar under Section 138 of the Negotiable Instrument Act ('N.I.Act' for short).

3. A criminal case has been filed by respondent No.2 – original complainant in the Court of Chief Judicial Magistrate, Surendranagar against the petitioners under Sections 138 read with Section 142 of the N.I.Act alleging inter-alia that the petitioners have given cheque No. 131423 dated 08.01.2005 for an amount of Rs.2,37,160/-. The said cheque was deposited in the Bank and same was returned by the Bank by written memo dated 19.01.2005 with an endorsement 'insufficient funds'. It is the case on behalf of the complainant in the complaint that the

original complainant received intimation with regard to the return of the cheque vide communication dated 22.01.2005 and statutory notice was send to the accused persons on 22.02.2005 by RPAD as well as by UPC. Said notice was received and/or served upon the accused persons on 01.03.2005 and accused persons gave evasive reply vide reply dated 11.03.2005. It is further averred in the complaint that as the petitioners' contract work was in progress at Palanpur one day delay has been caused in giving notices. Therefore, it is requested to condone the delay of one day. Learned Chief Judicial Magistrate, Surnedranagar vide order 02.04.2005 issued summons upon the petitioners for the offences punishable under Section 138 of the NIAct by condoning the delay of one day in issuing the notice as contemplated under Section 138(b) of the NIAct. Being aggrieved and dissatisfied with the order passed by the learned Chief Judicial Magistrate, Surendranagar in issuing the summons upon the petitioners under Section 138 of the NIAct by condoning delay of one day in issuing notice as contemplated under Section 138 of the NIAct, the petitioners – original accused have preferred the

present application under Section 482 of the Cr.P.C.

4. Mr.D.K.Dave, learned Advocate appearing on behalf of the petitioners has vehemently submitted that the learned Chief Judicial Magistrate, Surendranagar has materially erred in issuing the summons upon the petitioners by condoning the delay of one day in issuing notice as contemplated under Section 138(b) of the Act. It is submitted by Mr.Dave, learned Advocate that notice as contemplated under Section 138(b) of the NIAct was not issued within a period of one month from the date of intimation from the Bank with regard to return of the cheque, therefore, the complaint itself is not maintainable. It is further submitted by him that under the provisions of the NIAct more particularly Section 138 read with Section 142 of the NI Act, there is no power with the learned Magistrate to condone the delay in issuing notice as contemplated under Section 138 of the NI Act. It is submitted that therefore, condonation of delay of one day under Section 138 of the NIAct, is without jurisdiction and issuance of summons upon the petitioners by condoning delay of one

day in issuing notice under Section 138(b) of the NI Act, requires to be quashed and set aside. It is also further submitted that consequently the impugned complaint / criminal case itself requires to be quashed and set aside as the same is not maintainable. It is further submitted by him that provisions of NIAct more particularly Section 138 of the NIAct and time limit prescribed / stipulated in Section 138 of the NIAct are to be complied with strictly. Unless there are any powers to condone the same, no such condonation is permissible. Under the circumstances, it is requested to allow the present application and quash and set aside the impugned complaint / criminal case as the same is not maintainable.

5. On the other hand, Mr.P.P.Majmudar, learned Advocate appearing on behalf of respondent No.2 – original complainant has relied upon under Section 142 of the NIAct, and has submitted that the learned Magistrate has got powers to condone the delay in filing the complaint within one month as provided in Section 142 of the NI Act more particularly Section 142(b) of the NI Act; it is to be presumed that the

learned Magistrate is always having powers to condone other delays also such as delay in issuing notice as contemplated in Section 138 of the NIAct. He has further submitted that statue is to be read as whole. He has submitted that the complaint should not be quashed on technical ground looking to the object and purpose of enactment of Section 138 of the NIAct. He has further submitted that when the learned Magistrate has exercised discretion in condoning delay of one day in issuing notice as contemplated under Section 138 of the NI Act, same is not required to be interfered by this Court in exercise of inherent jurisdiction under Section 482 of the Cr.P.C. Under the circumstances, it is requested to dismiss present application.

6. Mr.K.T.Dave, learned APP has requested to pass an appropriate order by submitting that as such there are no powers vested with the learned Magistrate to condone delay in issuing notice as contemplated under Section 138(b) of the NIAct. Therefore, issuance of summons by the learned trial Court by condoning delay in one day in issuing notice as contemplated under Section 138(B) of the Act is without

jurisdiction. He has also further submitted that provisions of Section 138 of the NIAct are to be construed and followed strictly.

7. Heard the learned Advocates appearing on behalf of the respective parties.

8. It is an admitted position that there is delay of one day in issuing notice by the complainant as contemplated under Section 138 of the NI Act. As per Section 138(b) of the Act, a complainant and/or person holder in due course of the cheque is required to issue notice upon the accused persons within 30 days of intimation from the Bank of dishonor of cheque/ instrument. There is no power to condone delay in issuing notice as contemplated under Section 138(b) of the Act. Section 138 of the NIAct reads as under:

> "Section 138 :
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> *Dishonour of cheque for insufficiency, etc., of funds in the account- Where any cheque drawn by a persons on an account maintained by him with a banker for payment of any amount of money to another persons from out of that account for the discharge, in whole or in part, of any debt or other liability, is returned by the bank unpaid, either because of the amount of money standing to*

*the credit of that account is insufficient to honour the cheque or that it exceeds the amount arranged to be paid from that account by an agreement made with that bank, such person shall be deemed to have committed an offence and shall, without prejudice to any other provisions of this Act, be punished with imprisonment for [a term which may be extended to two years], or with fine which may extend to twice the amount of the cheque, or with both:*

*Provided that nothing contained in this section shall apply unless*

*(a) the cheque has been presented to the bank within a period of six months from the date on which it is drawn or within the period of its validity, whichever is earlier.*
*(b) the payee or the holder in due course of the cheque, as the case may be, makes a demand for the payment of the said account of money by giving a notice in writing, to the drawer of the cheque, within thirty days of the receipt of information by him from the bank regarding the return of the cheque as unpaid; and*
*(c) the drawer of such cheque fails to make the payment of the said amount of money to the payee or, as the case may be, to the holder in due course of the cheque, within fifteen days of the receipt of the said notice."*

The only power under the NIAct to condone delay is provided under Section 142 of the NI Act, whereby it is provided that criminal complaint/case is required to be filed before the learned Magistrate within one month after completion of 15 days i.e. time limit as provided under Section 138 of the NI Act. However, for some reasons the complaint could not be filed within one month, the learned Magistrate is

empowered to condone delay on sufficient grounds. Under the circumstances, whenever the Legislature has intended to condone the delay, same is provided and no such condondation of delay is provided in Section 138 of the NIAct. Under the circumstances, to condone delay in issuance of notice as contemplated under Section 138(b) of the NIAct would be to supplement to something what is not provided by the Legislature. Something which is not provided by the Legislature cannot be read in between. The provisions of statue, more particularly Section 138 of the NIAct is required to be complied with strictly and any deviation would entail consequences of non-maintainability of complaint. Under the circumstances, the contention on behalf of respondent No.2 – original complainant to read powers of the learned Magistrate to condone the delay by issuing notice under Section 138(b) of the NIAct considering provisions of Section 142 cannot be accepted. Power to condone delay as provided under Section 142 of the NIAct is to be read and considered only with regard to delay in filing the complaint within period of one month and it cannot be extended to condone delay with regard to other lapses more

particularly delay in issuing notice as contemplated under Section 138(b) of the NIAct.

The contention on behalf of respondent No.2 that the complaint should not be quashed on technical ground is concerned, it is required to be noted that whenever statue provides something to be done within stipulated time, same must be construed and compiled with strictly and any deviation would be considered acting contrary to the legislative intent and/or contrary to the statue. Under the circumstances, when it is provided under Section 138(b) of the NIAct that notice must be issued within a period of one month from the date of intimation from the Bank with regard to dishonour of cheque/instrument, same must be construed strictly and to dismiss the complaint and/or non-maintainability of the complaint if notice is not issued within stipulated time as provided under Section 138(b) of the NI Act is concerned, it cannot be said that the complainant is not non-suited on technical ground. On the contrary same would be in consonance with the provisions of the statue and legislative intent. Under the circumstances, the

learned Chief Judicial Magistrate, Surendranagar has committed error in issuing summons upon the petitioners for the offences punishable under Section 138 of the NIAct by condoning delay of one day in issuing notice by the original complainant as provided under Section 138(B) of the NIAct. When the notice has not been issued beyond 30 days of receipt of intimation from the Bank, complaint under Section 138 of the NIAct is not maintainable. Under the circumstances, impugned complaint/criminal case itself is not maintainable, and the same requires to be quashed and set aside by exercising powers under Section 482 of the Cr.P.C.

9. For the reasons stated above, the petition succeeds. The impugned complaint / criminal case No. 506 of 2005 pending in the Court of learned Chief Judicial Magistrate, Surendranagar as well as summons issued by the learned C.J.M., Surendranagar in the aforesaid criminal case are hereby quashed and set aside. Rule is made absolute to the aforesaid extent. However, it is made clear that it is always open for the original complainant to avail other remedies

available to him for releasing of the cheque amount if it is permissible under any other law.

[M.R.Shah, J.]

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